No. 8650

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

LEONG CHONG WING,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE

Upon Appeal from the District Court of the United States
for the Western District of Washington,
Northern Division.

HONORABLE JOHN C. BOWEN, *Judge*

J. CHARLES DENNIS,
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SUBJECT INDEX

LAWS AND STATUTES CITED

CASES CITED

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STATEMENT OF THE CASE

In the instant cause the defendant Leong Chong Wing, alias Lew Ching Wing, alias Yue Sing, alias Yoe Sing, alias Yoe Sing Wing, together with a co-

defendant, was charged in two counts of the indictment (Tr. 2) with a violation of Section 174, Title 21 U. S. C. A. and Section 1593(b), Title 19 U. S. C. A. In count I of the indictment, it is charged that the said defendants did receive, conceal, buy, sell and facilitate the transportation and concealment after importation of a certain derivative and preparation of opium, to wit, one ounce of opium prepared for smoking, which said opium the defendants knew had been imported into the United States contrary to law, in violation of Sec. 174, Title 21, U. S. C. A.

When the said cause was called for trial, count II of the indictment was upon motion of the appellee, dismissed and it will therefore not be necessary to consider this count of the indictment (Tr. 8).

Appellant Leong Chong Wing thereafter on the trial before a jury was convicted on count I of the indictment, the jury, upon motion concurred in by appellee, returning a directed verdict of "not guilty" as to the co-defendant Lyle G. Gray (Tr. 9). Appellant was thereupon sentenced to two years in the United States Penitentiary at McNeil Island, Washington, and to pay a fine of $500.00 (Tr. 11).

ARGUMENT

In discussing the assignments of error, particular attention will be directed to the two specifications of error argued in the appellant's brief.

1. That the court did not err in denying appellant's motion for a directed verdict (Assignment of Error Number 4).

2. That the court did not err in denying appellant's motion to suppress or in admitting Government's Exhibit Number 1 in evidence (Assignments of Error Numbers 1 and 2).

I

THE COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR A DIRECTED VERDICT

The appellant's first specification of error (Tr. 68) is not meritorious for the reason that the admission in evidence of Government's exhibit number 1, coupled with the appellant's admission on the trial that he was the owner of and had possession of the smoking

opium (Tr. 37), is more than amply sufficient to support the conviction herein, particularly in view of the provisions of Section 174, Title 21, U. S. C. A., which provides in part as follows:

> "Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury. (Feb. 9, 1909 c. 100, Sec. 2, 35 Stat. 614; Jan. 17, 1914, c. 9, 38 Stat. 275; May 26, 1922, c. 202, Sec. 1, 42 Stat. 596; June 7, 1924, c. 352, 43 Stat. 657.)"

This Honorable Court has had occasion to construe the above quoted provision of Section 174, Title 21 U. S. C. A. in a number of cases giving full effect thereto, particularly in the case of *Morlen v. United States*, 13 F. (2d) 625, wherein, at page 626, this Court in an opinion written by Judge Hunt, stated as follows:

> "Counsel for Morlen argues that the portion of the statute (42 Stat. 596, subd. (f)) which provides that, on a trial for the violation of subdivision c, whenever a defendant is shown to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction, unless the possession is satisfactorily

explained to the jury, raises a presumption that the person in possession was the importer of the drug, or, if it be established that the drug was imported, that the possessor had knowledge of its importation, but that the presumption cannot supply proof of the fact of the importation of the drug. Like argument was made in *Charley Toy v. United States* (C. C. A.) 266 F. 326, in *Ng Choy Fong v. United States*, 245 F. 305, 157 C. C. A. 497, and was considered in *Yee Hem v. United States*, 268 U. S. 178, 45 S. Ct. 470, 69 L. Ed. 904, where the Supreme Court held that it is not an illogical inference that opium found in this country after its importation has been prohibited has been unlawfully imported, and that a provision that possession of opium, in the absence of satisfactory explanation, creates a presumption of guilt is not unreasonable. The court said, 'By universal sentiment, and settled policy as evidenced by state and local legislation for more than a century, opium is an illegitimate commodity, the use of which, except as a medicinal agent, is rigidly condemned,' and held that the imposition upon one in possession of opium of the duty of rebutting or attempting to rebut the natural inference of unlawful importation or knowledge of it is not such an unreasonable requirement as to cause it to fall outside the constitutional power of Congress. *Rosenberg et al v. United States* (C. C. A.) 13 F. (2d) 369 (June 7, 1926)."

See also *Hooper v. United States*, 16 F. (2d) 868; and *Parmagini v. United States*, 42 F. (2d) 721.

II

THE COURT PROPERLY DENIED APPELLANT'S MOTION TO SUPPRESS AND PROPERLY ADMITTED IN EVIDENCE GOVERNMENT'S EXHIBIT NUMBER 1

Prior to the trial of the cause herein, the appellant by motion to suppress supported by affidavits executed by himself and the co-defendant Lyle G. Gray (Tr. 6, 42-44, 62-65) attacked the validity of the search of appellant's automobile and the seizure of certain opium found therein. The court overruled the motion and properly so. The facts and circumstances upon which the search and seizure were based are disclosed by the affidavits of the Customs and Narcotic officers (Tr. 44-61) and by the evidence adduced at the trial of the cause (Tr. 25-35), and briefly are as follows:

That the appellant Leong Chong Wing had theretofore and on or about March 23, 1931, in cause number 41286 in the United States District Court for the Western District of Washington, been convicted and

sentenced for a violation of the Narcotic Drugs Import and Export Act upon a plea of guilty (Tr. 36, 55-56). That the appellant at all times had the reputation of being a dealer in illicit narcotic drugs (Tr. 51, 55, 57). That on or about December 15, 1936, the Government officers received reliable information from an informant that the appellant had received an illicit shipment of opium, morphine and other narcotic drugs, and that the appellant was engaged in the sale of the said narcotic drugs in the city of Seattle (Tr. 51, 55, 57) ; that some of the Government officers had on prior occasions observed the appellant in the company of other known narcotic dealers who had previously been convicted, and that they had received numerous complaints of the appellant's activities in the illicit sale of narcotic drugs (Tr. 33, 51, 55, 57).

That thereafter, and on or about January 29, February 4th and February 12th, 1937, the officers received reliable information from an informant that the appellant would on said dates meet a white man for the purpose of effecting a sale and delivery of narcotic drugs, and that the appellant would be transporting the said narcotic drugs in his automobile (Tr. 31, 52,

59). That the Customs officers were acquainted with the informant and had on prior occasions received information from him which the officers always found reliable (Tr. 30, 33, 53). That on January 29th, acting on the said information, the officers observed the appellant leave his home at 3802 Dakota Street, driving an Oldsmobile sedan owned by the appellant, and followed the appellant to the corner of Third Avenue and Lenora Street in the city of Seattle, at which point the officers observed a white man get into the automobile of the appellant, the said white man being later identified as the co-defendant Lyle G. Gray (Tr. 25, 30, 45, 59). That the appellant Leong Chong Wing thereupon drove his automobile in a northerly direction along Third Avenue to Bell Street; then east on Bell Street to Fourth Avenue and south on Fourth Avenue to Virginia Street. That on February 4th the Government officers again received reliable information from the informant that the appellant would effect the sale of narcotic drugs to a white man; that they followed the appellant Leong Chong Wing, observing him meet Lyle G. Gray, who again entered the car of the appellant Leong Chong Wing in the

vicinity of Second Avenue and Virginia Street in the city of Seattle; that defendant Lyle G. Gray entered appellant Leong Chong Wing's automobile, at which time the appellant Leong Chong Wing proceeded to the vicinity of Third Avenue and Stewart Street in the city of Seattle, and the defendant Lyle G. Gray alighted from the automobile, the appellant Leong Chong Wing then proceeding to drive his automobile to the Chinatown district in the city of Seattle (Tr. 48). That on February 12, 1937, Government officers again received reliable information from an informant that the appellant Leong Chong Wing would meet a white man for the purpose of effecting a delivery of narcotics; that on the said date they observed the appellant Leong Chong Wing drive his automobile in the city of Seattle to the vicinity of Third Avenue and Lenora Street in the city of Seattle, at which time the defendant Lyle G. Gray entered the automobile of the appellant Leong Chong Wing (Tr. 25, 28, 30). The officers apprehended said defendant Lyle G. Gray and appellant Leong Chong Wing and placed them under arrest and proceeded to search the automobile of the appellant Leong Chong Wing for nar-

cotic drugs. That as a result of the search there was found in the automobile a glass jar containing one ounce of opium prepared for smoking (Tr. 26, 28, 46). The affidavits and evidence further disclosed that after the search of the said automobile the appellant Leong Chong Wing admitted that the opium belonged to him but stated that it was for his own personal use (Tr. 27, 29, 35, 54). The Government officers did not have a search warrant for the search of the appellant's automobile, and did not have a warrant for the arrest of the appellant.

The Supreme Court of the United States has consistently held that the Fourth Amendment to the Constitution of the United States does not denounce all searches and seizures, but only such searches and seizures as are unreasonable, and that the true rule is:

> "That if the search and seizure without a warrant are made upon probable cause, that is, upon a belief reasonably arising out of circumstances known to the seizing officer that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid."

Carroll v. United States, 267 U. S. 132.

That the officers in the instant case had a belief reasonably arising out of the circumstances known to them that the automobile of the appellant contained contraband subject to seizure and destruction under the law, is conclusively apparent from the facts heretofore set forth, and when these facts are interpreted in the light of a recent decision of the Supreme Court, entitled *Husty v. United States*, 282 U. S. 694, the officers undoubtedly had probable cause upon which to search the automobile of the appellant.

In the *Husty* case the facts as stated in the opinion are briefly as follows:

The officers knew the appellant Husty to be a "bootlegger" for a number of years prior to the arrest of the petitioners. That on two previous occasions the appellant Husty was arrested for violations of the National Prohibition Act, both arrests resulting in conviction and the second in imprisonment. On the day of petitioners' arrest, an officer testified he had received from an informant, information over the telephone that Husty had two loads of liquor in automobiles of a particular make and description, parked in particular places on named streets. The officer further

testified that he was acquainted with the informant, had come in frequent contact with him and that the informant had given similar information on prior occasions which had always been found to be reliable. That acting on this information, the officer found one of the cars described, at the point indicated, and unattended. Later, petitioners and a third man entered the car. That petitioner Husty had started the car when he was stopped by the officers. Petitioner Laurel and the third man fled. and the latter escaped. The officers, believing the car contained intoxicating liquor, searched it, and found it contained eighteen cases of whiskey.

The Supreme Court in an opinion written by Justice Stone, at page 700, stated as follows:

> "The Fourth Amendment does not prohibit the search, without warrant, of an automobile, for liquor illegally transported or possessed, if the search is upon probable cause; and arrest for the transportation or possession need not precede the search. *Carroll v. United States*, 267 U. S. 132. We think the testimony which we have summarized is ample to establish the lawfulness of the present search. To show probable cause it is not necessary that the arresting officer should have had before him legal evidence of the suspected il-

legal act. *Dumbra v. United States*, 268 U. S. 435, 441; *Carroll v. United States, supra.* It is enough if the apparent facts which have come to his attention are sufficient, in the circumstances, to lead a reasonably discreet and prudent man to believe that liquor is illegally possessed in the automobile to be searched. See *Dumbra v. United States, supra; Stacey v. Emery*, 97 U. S. 642, 645.

"Here the information, reasonably believed by the officer to be reliable, that Husty, known to him to have been engaged in the illegal traffic, possessed liquor in an automobile of particular description and location; the subsequent discovery of the automobile at the point indicated, in the control of Husty; and the prompt attempt of his two companions to escape when hailed by the officers, were reasonable grounds for his belief that liquor illegally possessed would be found in the car. The search was not unreasonable because, as petitioners argue, sufficient time elapsed between the receipt by the officer of the information and the search of the car to have enabled him to procure a search warrant. He could not know when Husty would come to the car nor how soon it would be removed. In such circumstances we do not think the officers should be required to speculate upon the chances of successfully carrying out the search, after the delay and withdrawal from the scene of one or more officers which would have been necessary to procure a warrant. The search was, therefore, on probable cause, and not unreasonable; and the motion to suppress the evidence was rightly denied. *Carroll v. United States, supra.*"

See also *Van Eeckhoute v. United States*, 79 F. (2d) 827; *Turner v. United States*, 73 F. (2d) 838; *Lambert v. United States*, 282 Fed. 413; *Milam v. United States*, 296 Fed. 629; *Green v. United States* 289 Fed. 236; *Stobble v. United States*, 91 F. (2d) 69.

The right to search the appellant's automobile and the validity of the seizure of the narcotics are not dependent on the right to arrest if the contents of the automobile are contraband and offend against the law. In *Carroll v. United States, supra*, at page 158, Justice Taft, in disposing of this contention, stated as follows:

> "The right to search and the validity of the seizure are not dependent on the right to arrest. They are dependent on the reasonable cause the seizing officer has for belief that the contents of the automobile offend against the law. The seizure in such a proceeding comes before the arrest as Section 26 indicates. It is true that Section 26, Title II, provides for immediate proceedings against the person arrested and that upon conviction the liquor is to be destroyed and the automobile or other vehicle is to be sold, with the saving of the interest of a lienor who does not know of its unlawful use; but it is evident that if the person arrested is ignorant of the contents of the vehicle, or if he escapes, proceedings can be had

against the liquor for destruction or other disposition under Section 25 of the same title. The character of the offense for which, after the contraband liquor is found and seized, the driver can be prosecuted does not affect the validity of the seizure.

"This conclusion is in keeping with the requirements of the Fourth Amendment and the principles of search and seizure of contraband forfeitable property; and it is a wise one because it leaves the rule one which is easily applied and understood and is uniform."

Section 173, Title 21 U. S. C. A. specifically declares opium prepared for smoking to be contraband and subject to forfeiture.

It is not necessary in order to establish probable cause as contended in appellant's brief that the Government officers should have had before them legal evidence of the suspected illegal act. It is sufficient if the apparent facts which came to their attention would lead a reasonably discreet and prudent man to believe that a narcotic drug was illegally possessed in the appellant's automobile.

Husty v. United States, supra.
Carroll v. United States, supra
Dumbra v. United States, 268 U. S. 435, 441.

And it is undoubtedly evident from the facts set forth in the affidavits of the officers involved in the search and seizure and from the facts admitted in evidence on the trial of this case, that a reasonably discreet and prudent man, under the circumstances, could only believe that a narcotic drug was illegally possessed in the appellant's automobile.

It is therefore submitted that the trial court did not err in denying the appellant's motion to suppress, in admitting in evidence Government's Exhibit number 1, or in refusing to grant a directed verdict, and the decision of the trial court herein should be affirmed.

Respectfully submitted,

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